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No. 430

In the Supreme Court of the United States

OCTOBER TERM, 1948

ISAAC GAYNOR, PETITIONER

v.

AGWILINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 23-30) are reported at 76 F. Supp. 617. The opinion of the United States Court of Appeals for the Third Circuit, sitting *en banc* (R. 41-53), is reported at 169 F. 2d 612.

JURISDICTION

The judgment of the Court of Appeals was entered August 4, 1948 (R. 53). The petition for a

writ of certiorari was filed October 16, 1948, and was granted November 22, 1948 (R. 54).[1] The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED[2]

1. Whether respondent was actually an operating agent in possession and control of the vessel upon which petitioner, a civil service employee of the United States, was serving as a crew member at the time of his injury, and was as such liable to petitioner for his wages, maintenance and cure.

2. Whether in a case arising after the enactment of the War Shipping Administration (Clari-

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[1] On the same day, this Court also granted certiorari in No. 351, *Cosmopolitan Shipping Company* v. *McAllister* and No. 360, *Fink* v. *Shepard S. S. Co.*, and set the three cases down for hearing immediately following No. 179, *Wedde* v. *Dichmann, Wright & Pugh*, in which certiorari had already been granted, and which, like these three cases, also involves the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for respondent general agent in this case and for the general agents in the other cases because, in accordance with the wartime general agency agreement between respondent and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W. S. A. Form GAA 4-4-42 (R. 5, 12)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

[2] These questions are here stated in terms of petitioner's contentions; they are phrased more generally and more extensively in the Brief for the Petitioner (pp. 2-4) in *Cosmopolitan Shipping Company, Inc.* v. *McAllister*, No. 351.

fication) Act of March 24, 1943, the remedy of a government-employed seaman for wages, and maintenance and cure is exclusively against the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, i. e., the War Shipping Administration (Clarification) Act (57 Stat. 45, 50 U. S. C. App. 1291) and R. S. 1753 (5 U. S. C. 631), together with certain applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in Appendix A to the Petitioner's Brief in *Cosmopolitan Shipping Company, Inc.* v. *McAllister,* No. 351, and will not be reprinted here.

STATEMENT

Petitioner Isaac Gaynor signed shipping articles on September 10, 1945, as a member of the crew of the War Shipping Administration SS *Christopher Gadsden.* The articles, which were in the statutory form of an agreement with the master as representative of the shipowner, contained the endorsement:

> It is also agreed that the Master, Officers, and all other Members of the Crew are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of Agwilines, Inc. * * *.

and expressly identified respondent Agwilines as general agent for the War Shipping Administra-

tion (Ex. A, R. 38-39).[3] By reason of this employment, petitioner was an unclassified civil-service employee of the United States under Section xxi (1) of Schedule A to the Civil Service Rules (Appendix A, No. 351, p. 138). Respondent Agwilines was a general agent or ship's husband employed by the United States to operate the accounting and certain other parts of the shoreside business of the *Gadsden* and other WSA vessels, in accordance with the wartime standard form GAA 4-4-42 husbanding agreement, to the extent and in the manner which the Government by "directions, orders or regulations" might from time to time prescribe (R. 5-19).[4]

The articles called for a foreign voyage, from Philadelphia, Pennsylvania, to undisclosed ports and return, for a period not exceeding twelve months, (R. 3). While the *Gadsden* was at Charleston, South Carolina, on December 24, 1945, petitioner obtained shore leave, left the vessel about 5:00 p. m. and purchased a bus ticket for a trip to visit relatives (R. 3). Petitioner boarded the bus the next day, but after it had proceeded about thirty miles from Charleston it became involved in a highway accident and petitioner was injured (R. 3-4).

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[3] The stipulation of facts states that petitioner "entered into shipping articles with the defendant" (R. 3). But the official printed form of articles, Exhibit A, states that the agreement was "between the master and seamen, or mariners, of the SS *Christopher Gadsden*, of which John J. Kelly is at present master, or whoever shall go for master."

[4] WSA Form GAA 4-4-42, 7 F. R. 7562; 46 C. F. R., 1943 Cum. Supp., p. 11427, sec. 306.44.

Petitioner was disabled, required medical treatment, and as a result was unable to engage in his occupation (R. 4).

Petitioner brought this suit against respondent[5] seeking recovery of $15,000 for wages, for maintenance and cure, and for loss of personal effects (R. 32-34).[6] The complaint alleged that respondent "possessed, owned, operated and controlled the Steamship *Christopher Gadsden,*" that petitioner "entered into shipping articles with defendant [respondent] as a member of the crew of the Steamship *Christopher Gadsden*" and that "by virtue of his service upon the vessel," he was entitled to recover his wages, maintenance and cure from respondent (R. 32-33). Respondent's answer denied the allegations that it possessed, owned, operated or controlled the *Gadsden* and that petitioner entered into shipping articles with it; instead, it averred that the vessel "was serviced by it as Agent for the United States" pursuant to the terms of a general agency agreement in the standard form (7 F. R. 7562), and that petitioner "was on board the said vessel pursuant

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[5] On February 24, 1947, petitioner also filed a libel against the United States in admiralty. *Isaac Gaynor* v. *United States of America and United States Maritime Commission,* U. S. District Court, Eastern District of Pennsylvania, Admiralty No. 77 of 1947. This admiralty suit has not yet been brought to trial.

[6] The cause of action for the value of petitioner's personal effects, which were lost after their removal from the vessel by respondent, has been settled and paid by direction of the United States Maritime Commission, and is thereby eliminated from the case.

to the terms of a written contract embodied in the Shipping Articles of said vessel, and not otherwise" (R. 34-35). The answer further alleged as affirmative defenses that the *Gadsden* was "owned, operated and controlled by the United States," that respondent "acted only as Agent" pursuant to the standard form agreement, and that petitioner had failed to comply with Public Law 17, 78th Congress (the Clarification Act), requiring all actions for claims of the nature asserted in the complaint to be brought pursuant to the Suits in Admiralty Act (R. 36-37).

The case was submitted to the district court on the pleadings, an agreed statement of facts (R. 3-4), the shipping articles (Ex. A, R. 38-39), and the GAA 4-4-42 agreement together with the delivery and redelivery certificates evidencing the vessel's allocation to respondent (R. 5-22). That court held petitioner, having complied with the Clarification Act by filing claim in accordance with the War Shipping Administration's regulations, was entitled to enforce his claim by court action, but "such action must be brought, since the plaintiff was an employee of the United States through the War Shipping Administration at the time the cause of action arose, in accordance with the terms of the Clarification Act, which provides that the action must be brought pursuant to the Suits in Admiralty Act" (R. 25). The action against respondent was therefore dismissed and the dismissal

confirmed on rehearing (R. 31). On appeal, the court below, sitting *en banc*, unanimously affirmed (R. 53). It held that the Clarification Act gave federally employed seamen substantive rights "to be measured by those of seamen employed by private ship owners rather than by those of other employees in the government service," but since such seamen "were in fact employees of the United States and not of private ship owners the rights which were thus given them must necessarily be enforced against their employer, the United States" (R. 45). It further held that, independently of the Clarification Act, petitioner had no enforceable right against respondent since he was fully aware that the United States was operating owner in possession and control of the *Gadsden* and his employer as such (R. 49).[7]

ARGUMENT

Petitioner, a civil-service seaman of a War Shipping Administration vessel, who was injured in a bus accident ashore, at a point over thirty miles from his vessel while on authorized shore leave to visit relatives, brought this suit to recover wages, and maintenance and cure, in the sum of $15,000, against respondent, an agent of the United States

[7] Judge Biggs concurred specially (R. 53), on the ground stated in his separate opinion in *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d 606 (now pending on petition for a writ of certiorari, No. 291 Misc., this Term), that this Court's decision in *Caldarola* v. *Eckert*, 332 U. S. 155, had overruled or limited the doctrine of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707.

employed under the wartime GAA 4-4-42 husbanding agreement. The issue thus presented is whether a civil-service employee of the United States, injured while serving as a crew member of a government-owned and operated vessel, may recover for his injuries in a suit brought against a ship's husband or general agent which acted for its disclosed principal, the United States, only in respect of certain shoreside business of the vessel, and had no authority or control over the work of such employee, or the navigation and physical management and operation of the vessel, and neither caused the injuries nor owed any duty to prevent them. Both lower courts held that he could not recover on a cause of action which, like his, arose after the War Shipping Administration (Clarification) Act of March 24, 1943 (c. 26, 57 Stat. 45, 50 U. S. C. App. 1291), and that his exclusive remedy was by suit against his employer, the United States (R. 25, 28, 45). The court below further held, in reliance upon its decision *en banc* of the same day, in *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d 606 (now pending on petition for a writ of certiorari, No. 291 Misc., this Term), that as respondent was a simple agent for a disclosed principal, and not an operating agent or owner *pro hac vice* in possession and control of the Government's vessel, it could not be held liable for petitioner's wages, and maintenance and cure, in any event (R. 49).

The reasons and authorities establishing the

correctness of these lower court holdings in the present case are set forth in detail in our Brief for the Petitioner in the companion case of *Cosmopolitan Shipping Co., Inc.* v. *McAllister* (No. 351, this Term), and need no repetition. It will suffice to point out here the salient defects of the particular contentions with which this petitioner attacks the decision below.

1. The heart of petitioner's contention here is that the lower courts erred in failing to find that respondent was actually operating the vessel for or on behalf of the United States, as distinct from managing the vessel's "business" (Br. 9). But the owner of a vessel is deemed to continue as operating owner in possession [8] and therefore liable for the claims of her crew, and one who seeks to recover against another has the burden of proving that the latter has been made owner *pro hac vice* (*i.e.* operating owner to whom the vessel belongs for the voyage, see 46 U.S.C. 713).[9] It is in disregard of these established principles that petitioner demands that respondent, against whom he has chosen to bring his suit, assume the burden of

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[8] *Hagar* v. *Clark*, 78 N. Y. 45, 50; *Raymond* v. *Tyson*, 17 How. 53, 63-64; *Pacific Imp. Co.* v. *Schubach-Hamilton S. S. Co.*, 214 Fed. 854 (W. D. Wash.); *Grimberg* v. *Columbia Packers' Assn.*, 47 Ore. 257, 270-271.

[9] *Everett* v. *United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Baccarat* v. *Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Cox* v. *Lykes Bros.*, 237 N. Y. 376; *Roberts* v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477.

proving its non-liability (Br. 8). On the contrary, it is plain as a matter of law, as we point out in No. 351, that respondent was not an operating agent in possession and control of the Government's vessel nor its owner *pro hac vice*.

Throughout his brief petitioner seeks to confuse the role of the ship's husband or "general agent," who "operates" the vessel's "business," with that of the "operating agent" who mans, navigates, and physically manages the vessel as owner *pro hac vice* pursuant to a demise of the ship from its general owner. And by language torn from context in the GAA 4-4-42 husbanding agreement (Br. 10-11, 17-18), the WSA "delivery certificate" evidencing the beginning and end of the vessel's assignment to an agent (Br. 14-15, 20), and certain of the Operations Regulations by which WSA issued instructions to its masters through its agents as its recognized channel of communication (Br. 24-27), petitioner insinuates that the absence of a demise to the agent from the United States of the physical possession and control of its vessels is without significance. But the insubstantiality of petitioner's suggestions is fully shown in our brief in the *McAllister* case (No. 351). We there demonstrate that under the decided cases the presence of a demise to the agent of the vessel is as critical for the creation of an "operating agency" as is a demise to the charterer for that of a bareboat charter (Pet. Br. in No. 351, Point IV, 102-114).

We point out that the language of the GAA 4-4-42 husbanding agreement, on which petitioner relies to show that the agent has physical possession and custody of the vessel, is found equally in the berth agency and berth sub-agency agreements (Pet. Br. in No. 351, pp. 76-86), that the "delivery certificates" refer only to a "delivery" for accounting purposes under the GAA 4-4-42 husbanding agreement,[10] and that the Operations Regulations confirm that control of even the minutiae of physical operation was retained by WSA (Pet. Br. in No. 351, pp. 86-95).

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[10] The fallacy of attributing undue weight to the use of words such as "delivered" and "redelivered" is discussed in detail in the petitioner's brief in No. 351, p. 57, fn. 24.

Petitioner's reliance on the signature of such a "delivery certificate," in another case, by the master (Br. 20), and on the statement of an insurance company to a general agent, in still another case, that masters of vessels under the GAA 4-4-42 husbanding agreement might be treated as its employees for purposes of the agent's commercial fidelity bond (Br. 23-24) are totally without significance. It is obvious that such acts cannot bind this respondent nor the Government. Moreover, it is elementary that if the fact be disclosed to the parties, an agent (i.e., the master) of a principal, such as the United States, may also act on behalf of another agent (i.e., the general agent) of the same principal. Cf. *Restatement of Agency*, secs. 391, 392. The Maritime Commission informs us that it has never felt required to object to its masters signing inventories and delivery receipts on behalf of a general agent where the agent is not represented in the port at which the "delivery" or "redelivery" takes place and no inventory service company is available (as was the case here, see R. 21). With respect to the matter of bonding masters of vessels under GAA 4-4-42 agreements, the WSA prescribed a standard form of bond by General Order 28, 46 C. F. R. 1943 Cum. Supp., p. 11449. If general agents desired additional commercial coverage for any reason, the expense would not be reimbursable to the agent and WSA could not, of course, object to its form or to the extension of the coverage to include employees of the government.

2. Petitioner appears to urge that this Court's holding in *Caldarola* v. *Eckert*, 332 U. S. 155, 159, that an agent under the GAA 4-4-42 husbanding agreement is not an owner *pro hac vice* or "operating agent", has no vitality except in the state courts, and that, in any event the Court's conclusions were erroneous. (Br. 28-35.) The broad grounds which show the correctness of the *Caldarola* decision are the subject of most of our brief in No. 351. And that this Court was applying federal law, in determining that the general agent was not in possession and control of the vessel nor its owner *pro hac vice*, is apparent on the face of the opinion (332 U. S. at 158-9).

3. Petitioner also attempts to find support for his view that general agents are operating agents by extended reference to the intermediate report of a trial examiner for the National Labor Relations Board in the so-called *Barge Carriers* case (Br. 36-40). In answer, it seems sufficient to refer to the official correspondence between the War Shipping Administration and the National Labor Relations Board, described in petitioner's brief in No. 351 (pp. 72-74) and set forth in the record in *Fink* v. *Shepard Steamship Co.*, No. 360, this Term, at R. 43-57. That correspondence discloses that the Board did *not* adopt the view that the seamen were employees of the general agents, but effected an arrangement with WSA whereby the Board's facilities were to be available even though the seamen

were government-employed. Petitioner incorrectly implies that the Board receded from this position in the *Barge Carriers* case. The truth is that, whatever may have been the trial examiner's views, the Board itself never decided that WSA merchant seamen were not government employees, or that the general agents were their employers. In the *Barge Carriers* matter, the trial examiner's intermediate report was issued on March 17, 1944, and the case was then transferred to the Board itself on March 22, 1944. It was retained before the Board in an inactive status until February 13, 1947, when, on motion of the complaining union, the Board dismissed the complaint without prejudice, and without making any determination on the issue here involved. As for the examiner's intermediate findings, on which petitioner relies so heavily, we believe that, like petitioner's own contentions, they suffer from the double infirmity of being in conflict with the *Caldarola* decision and unsupported by the terms and practice of the GAA 4-4-12 agreement.[11]

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[11] For the convenience of the Court, we print the relevant portion of the trial examiner's intermediate report, as well as related documents, in the Appendix, *infra*, pp. 16-32.

One crucial defect in the trial examiner's report is his entire failure to differentiate between the GAA 4-4-12 husbanding agreement and the special operating agency agreement which was before the National Labor Relations Board in its *Cosmopolitan* case, to which he refers as a precedent. As we have pointed out in the Brief for the Petitioner in No. 351 (pp. 50-51, 58-61, 156-162), the latter agreement which was also involved in *Odgaard* v. *Cosmopolitan Shipping*

4. Petitioner finally urges that "the Clarification Act did not affect any rights between the seamen and private operators" (Br. 44-53). He argues that various decisions by trial judges sitting alone which conflict with that of the court below sitting *en banc*, of the Supreme Court of Oregon in the *Fink* case (No. 360, this Term), and of the Ninth Circuit in *Lubinski* v. *Alaska S. S. Co.*, 153 F. 2d 1013, constitute a numerical weight of decision to which this Court should bow. We submit that, on the contrary, we have proved in the Brief for the Petitioner in No. 351 (pp. 114-134) that the Clarification Act requires that, on causes of action arising after its enactment, all WSA seamen shall vindicate their rights exclusively by suit against the United States under the Suits in Admiralty Act.

Co., 171 Misc. 244; *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; and *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, expressly provided that the agent should operate the vessel as owner *pro hac vice* and man it with a crew employed by itself and not by the United States. This is the direct contrary of what is provided by GAA 4-4-42, where the general agent is only a ship's husband whose authority stops at the water's edge.

CONCLUSION.

For the reasons set forth in the Brief for the Petitioner in No. 351, *Cosmopolitan Shipping Co., Inc. v. McAllister,* and summarized above, it is respectfully submitted that the decision of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
PAUL A. SWEENEY,
Attorneys.

JANUARY 1949

APPENDIX

NATIONAL LABOR RELATIONS BOARD

WASHINGTON 25, D. C.

FEBRUARY 13, 1948.

Re: Barge Carriers, Inc.—Case No. 10-C-1382

Mr. H. G. MORISON,
Acting Assistant Attorney General,
United States Department of Justice,
Washington 25, D. C.

DEAR SIR:

In reply to your letter of February 12, I am sending you enclosed a certified copy of the Intermediate Report issued by the Trial Examiner in this case on March 22, 1944.

After this Report issued, exceptions to the Trial Examiner's Findings and Recommendations were filed by the respondent. Before the Board issued any decision in this matter, the charging union requested permission to withdrawn the charge. On February 13, 1947, the Board entered an Order Permitting Withdrawal of Charge and Dismissing Complaint. A certified copy of the Order is also enclosed.

Very truly yours.

(Sgd.) FRANK M. KLEILER,
Executive Secretary.

Enclosures.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-C-1382

IN THE MATTER OF BARGE CARRIERS, INC. *and* ATLANTIC AND GULF DISTRICT OF THE SEAFARERS INTERNATIONAL UNION OF N. A.

Order Permitting Withdrawal of Charge and Dismissing Complaint

The Board having, on March 22, 1944, issued an Order transferring the above-entitled proceeding to itself, and thereafter, on January 29, 1947, Seafarers International Union of North America having requested permission to withdraw its charge previously filed herein, and the Board having duly considered the matter,

It is hereby ordered, pursuant to Section 203.7 of National Labor Relations Board Rules and Regulations—Series 4, that the said Union be, and it hereby is, granted permission to withdraw its charge in the above-entitled proceeding; and

It is further ordered that the complaint be, and it hereby is, dismissed without prejudice, and that the aforesaid case be, and it hereby is, closed.

Dated Washington, D. C., February 13, 1947.

By direction of the Board:

(S.) JOHN E. LAWYER,
Chief, Order Section.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRIAL EXAMINING DIVISION

WASHINGTON, D. C.

Case No. 10-C-1382

IN THE MATTER OF BARGE CARRIERS, INC. *and* ATLANTIC AND GULF DISTRICT OF THE SEAFARERS INTERNATIONAL UNION OF N. A.

Mr. Mortimer H. Freeman, for the Board.
Mr. W. J. Kelley, of Fort Lauderdale, Fla., for the respondent.
Mr. J. K. Shaughnessy, of Fort Lauderdale, Fla., for the Union.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon an amended charge duly filed by Atlantic and Gulf District of Seafarers International Union of N. A., herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Tenth Region (Atlanta, Georgia), issued its complaint, dated October 14, 1943, against Barge Carriers, Inc., herein called the respondent, alleging that the respondent had engaged and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8(1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49

Stat. 449, herein called the Act.[12] Copies of the complaint, together with notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that the respondent discharged Hans E. Hansen on or about May 9, 1943, and thereafter refused to reinstate him because of his membership in and activity on behalf of the Union and because he engaged in concerted activity with other employees, thereby discriminating in regard to his hire and tenure of employment and discouraging membership in the Union; and (2) that by the foregoing conduct, and since March 1, 1943, by urging, persuading, threatening and warning its employees to refrain

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[12] Evidence was adduced by the respondent for the purpose of showing that the Union and J. K. Shaughnessy, who signed the charge and amended charge as agent of the Union, had not complied with a Florida statute requiring, among other things, that labor organizations operating in Florida make an annual report to the Secretary of State and that business agents of labor organizations obtain a license or permit. Chaper 21968, No. 334, June 10, 1943. The respondent contends that, because of failure of compliance with this statute, neither the Union nor Shaughnessy "was authorized" to file a charge with the Board, and that the Board accordingly lacked jurisdiction to issue a complaint. It is unnecessary to determine whether the Union or Shaughnessy has complied with the statute, since lack of compliance, if any, would not disqualify them from filing a charge. The Act provides no limitations as to who may file a charge. In *N. L. R. B.* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, the Supreme Court of the United States, speaking through Mr. Justice Jackson, stated:

"The charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading. Dubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry."

from assisting or joining the Union, by threatening to cut wages and curtail employment because of the union activity of the employees, and by vilifying the Union, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Thereafter, the respondent filed its answer, admitting certain allegations of the complaint concerning its business, and denying that it had engaged in unfair labor practices. In its answer, the respondent moved to dismiss the complaint on the ground, in substance, that the respondent is not the employer of the employees herein concerned, within the meaning of Section 2 (2) of the Act. During the hearing, mentioned below, the undersigned reserved his ruling upon this motion. For reasons which appear below, the motion is hereby denied.

Pursuant to notice, a hearing was held at Fort Lauderdale, Florida, on October 28, 29, 30 and 31, and November 5, 1943, and at Miami, Florida, on November 15, 1943, before Robert F. Koretz, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by a representative; all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. Near the close of the hearing, counsel for the Board moved to conform the pleadings to the proof respecting formal matters. There was not objection; the motion was granted. At the conclusion of the hearing counsel for the Board and for the respond-

ent argued orally before the undersigned. Subsequent to the hearing, the respondent filed a brief with the undersigned.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Barge Carriers, Inc., is a New York corporation having its principal office in New York City. It is licensed to do business in Florida and maintains docks and places of business at Fort Lauderdale and Port Everglades, Florida. It is engaged in operating the tug *Humrick* and various barges for the account of the War Shipping Administration. In the conduct of its business the respondent transports substantial quantities of sugar and other commodities to and from ports in foreign countries from and to ports in the United States. The respondent admits that it is engaged in commerce, within the meaning of the Act.

The undersigned finds that the respondent is engaged in trade, traffic, commerce, and transportation among the several States and between the United States and foreign countries, and that the employees aboard the tug and barges operated by the respondent are directly engaged in such trade, traffic, commerce and transportation.

II. THE ORGANIZATION INVOLVED

Atlantic and Gulf District of the Seafarers International Union of North America is a labor organization affiliated with the American Federa-

tion of Labor. It admits to membership employees of the respondent.

III. THE RESPONDENT'S STATUS AS EMPLOYER

The respondent contends that the United States, and not itself, is the employer of the employees here concerned and that, in accordance with Section 2(2) of the Act,[13] the Board lacks jurisdiction over it.

The respondent was organized as a corporation in 1941. Until October 1942 it operated the tug *Humrick* and the barges *Lake Frumet* and *Lake Farge* as a single unit for the account of Daniel C. Robinson, Inc., the owner or charterer of the vessels.[13a] Prior to October 1942 the respondent was engaged in the carriage of freight, shipping coal from Norfolk to Havana, manganese ore from Santiago to Mobile, and sulphur from New Orleans to North Atlantic ports. Shortly before October 1942 the respondent was requested by the United States, presumably through the War Shipping Administration, herein called the W. S. A.[13b]

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[13] Section 2 (2) of the Act provides:

"The term 'employer' includes any person acting in the interest of an employer, directly or indirecuy, but shall not include the United States, or any State or political subdivision thereof * * *."

[13a] The *Humrick* was owned by the Ford Motor Company and chartered by Daniel C. Robinson, Inc.

[13b] In February 1942, the President of the United States, "in order to assure the most effective utilization of the shipping of the United States for the prosecution of the war," by Executive Order created the W. S. A. Executive Order No. 9054 of February 9, 1943. The Executive Order provides, *inter alia*, that the W. S. A. shall "control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States," with certain exceptions not here relevant.

to operate the vessels under its instructions. After carrying general cargo between Port Everglades, Florida, and Havana, Cuba, on two voyages, the respondent informed the W. S. A. that it could not continue this service since it resulted in an operating loss. The W. S. A. then stated that it would "take over" the vessels and that the respondent would operate them for the W. S. A. Early in October the W. S. A. took possession of the vessels, which the respondent had operated, on a bare-boat charter basis. The United States, acting through the W. S. A., and the respondent entered into a service agreement. This agreement, termed in the record as the General Agency Agreement, defines the duties and responsibilities of the respondent with respect to vessels of which the W. S. A. is owner or, under bare-boat charter, owner *pro hac vice,* which may be assigned to the respondent as general agent of the W. S. A. The terms of this agreement provide, *inter alia,* that the respondent, called the general agent therein, is an agent of the United States, and not an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time; that the general agent will maintain the vessels in such trade or service as the United States may direct, subject to the orders of the United States as to voyages, cargoes, and to all matters connected with the use of the vessels, and will equip, victual, supply, and maintain the vessels subject to such directions, orders, regulations, and methods of supervision as the United States may from time to time prescribe; that the general agent will procure the master of the

vessels operated under the agreement, subject to the approval of the United States, who thereby becomes the agent and employee of the United States; that the general agent, through the usual channels and in accordance with customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated, will procure and make available for the master for engagement by him such officers and men whom he may require to fill the complement of the vessel; that the officers and members of the crew shall be paid in the customary manner with funds provided by the United States; and that the United States shall reimburse the general agent for all crew expenditures, including disbursements for wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages, or compensation for death or personal injury or illness, and insurance premiums required to be paid by law, custom, or by the terms of the ship's articles or labor agreements.

The vessels which the respondent previously had operated were assigned to it by the W. S. A. Subsequently, in March 1943, another barge, the *Lake Louise,* which formerly was owned by the Ford Motor Company, was assigned by the W. S. A. to the respondent for its operation. In accordance with the terms of the service agreement, the respondent operates the tug and the three barges under the direction of the W. S. A. The W. S. A. directs the respondent as to where and when the vessels shall sail. Thus, the respondent's tug *Humrick* is one of a pool of about five tugs which the W. S. A.

maintains at Port Everglades. The W. S. A. gives instructions as to which barges the tugs shall tow. The *Humrick* frequently tows barges which are privately owned or which are operated for the W. S. A. by others. With respect to the cargo carried upon the barges operated by the respondent, the W. S. A. directs the respondent to enter into contracts, called charter parties, with shippers for the carriage of certain cargo.[14] The money which the respondent receives from shippers in pursuance of the charter parties is deposited in a bank selected by the W. S. A. in an account entitled: "Barge Carriers, Inc., special account, War Shipping Administration." From these funds the respondent pays all operating expenses, such as for repairs, fuel and wages. When, for example, the respondent needs funds for the payment of wages of the seamen, it draws a check upon this account covering the total amount of wages, submits the check for the approval of the W. S. A., and upon such approval may withdraw the funds from the special account.[15] For the services performed under the General Agency Agreement, the respondent receives a certain sum for each vessel per month, plus a bonus for each ton of cargo which is carried.

Although the execution of the General Agency Agreement thus circumscribed the respondent's

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[14] The charter parties are signed by the respondent as follows:

The United States of America.
By War Shipping Administration.
By Barge Carriers, Inc., General Agent.

[15] The respondent, under the terms of the General Agency Agreement, must maintain a bond for the faithful performance of its responsibilities under the agreement.

control over the operation of the vessels, no substantial change occurred in the relationship between the respondent and the employees here concerned in respect to their wages, hours of employment, and similar conditions of employment. The respondent still hires the master, subject, however, to the approval of the W. S. A., and may discharge him. The master continues to select his crew from sources made available to him by the respondent. It was and is the respondent's practice to maintain a roster of applicants for positions aboard the vessels. When it is necessary to hire an employee, the respondent recommends to the master one of the applicants. The master continues to discharge employees, frequently at the recommendation of subordinate officers. Hours of duty, rest periods, and similar conditions aboard ship are controlled by the master. The respondent maintains the basic scale of wages which it had established prior to the execution of the General Agency Agreement. Subsequent to the execution of the General Agency Agreement, a representative of the W. S. A. requested information of the respondent as to the "wage schedules, overtime rates and working conditions of the personnel on tugs and barges operated by" the respondent for the account of the W. S. A. After submitting such information, the respondent was told to maintain its existing wage scale and other labor relations policies while operating for the account of the W. S. A. The W. S. A. has not otherwise exercised any control over the hire and tenure of employment, wages, hours of duty, or other conditions of employment of the personnel aboard the vessels operated by the re-

spondent. And it is plain from the testimony of members of the crew that they regard the respondent, and not the W. S. A., as their employer.

From the foregoing findings, considered in the light of the entire record, the undersigned is convinced that the respondent is the employer of the employees here concerned, within the meaning of the Act. The acquisition by the W. S. A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W. S. A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W. S. A. to change, the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only nominal supervision of the W. S. A. The creation of the W. S. A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W. S. A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the Act, the Congress cannot have intended the exception to apply to a situation in which for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal and temporary supervision of the W. S. A. In the *Cosmopolitan Shipping*

Company case,[16] in which the contractual relationship between the United States and the company there involved was substantially the same as that between the United States and the respondent, the Board said:

> It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, the Company is in full charge, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels. Under these circumstances, we do not feel that the Government can be said to be the employer of the engineers on its vessels. Furthermore, we are satisfied that the exemption of the Government for the operation of the Act was not meant to apply in the case of a commercial venture of this nature. We find, therefore, that the Company, in hiring the licensed engineers employed on the vessels which it operates, is an employer under the provisions of the Act.

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[16] *Matter of Cosmopolitan Shipping Company, Inc.*, 2 N. L. R. B. 759. See also *Matter of Southgate-Nelson Corporation*, 3 N. L. R. B. 535; *Matter of Southgate-Nelson Corporation*, 4 N. L. R. B. 307.

The undersigned finds that the respondent is an employer of the employees aboard the vessels operated by the respondent, within the meaning of the Act.

* * * * * * *

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Atlantic and Gulf District of the Seafarers International Union of N. A. is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Hans E. Hansen, thereby discouraging membership in Atlantic and Gulf District of the Seafarers International Union of N. A., the respondent has engaged and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends

that the respondent, Barge Carriers, Inc., and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Atlantic and Gulf District of the Seafarers International Union of N. A., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to Hans E. Hansen immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole Hans E. Hansen for any loss of pay he may have suffered by reason of the respondent's discrimination in regard to his hire and tenure of employment by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his dis-

charge, May 9, 1943, to the date of offer of reinstatement, less his net earnings during said period;

(c) Post immediately in conspicuous places on the vessels, which it operates, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notice to its employees stating that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) (b) of these recommendations; and (3) that the respondent's employees are free to become or remain members of the Atlantic and Gulf District of the Seafarers International Union of N. A., or of any other labor organization, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that or any other labor organization;

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Rela-

tions Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring this case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to this Intermediate Report, or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

Robert F. Koretz,
ROBERT F. KORETZ,
Trial Examiner.

Dated March 17, 1944.

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